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**MINUTES**  
**FRIDAY – AUGUST 1, 2003**

Call to Order

The Board of Environmental Review's regularly scheduled meeting was called to order by Chairman Russell at 8:06 a.m., on Friday, August 1, 2003, in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana.

Attendance

Board Members Present: Chairman Joseph Russell, Dr. Garon Smith and Ward Shanahan

Board Members Present via Telephone: Russ Hudson and Susan Kirby Brooke

Board Members Absent: Kim Lacey and David Fishbaugh

Board Attorney(s) Present: Tom Bowe, Attorney General's Office, Department of Justice

Board Secretary Present: Joyce Wittenberg

Court Reporter Present: Laurie Crutcher

Department Personnel Present: Jan Sensibaugh, Director; Tom Livers, Deputy Director; John North, Chief Legal Counsel, Legal Unit (Legal), DIR; Claudia Massman, Legal, DIR; Jolyn Eggart, Legal, DIR; Ed Hayes, Legal, DIR; David Rusoff, Legal, DIR; Norman Mullen, Legal, DIR; Steve Welch, Administrator, Permitting & Compliance Division (PCD); Judy Hanson, PCD; Don Vidrine, Chief, Air & Waste Management Bureau (AWMB), PCD; Vickie Walsh, AWMB, PCD; Bonnie Lovelace, Chief, Water Protection Bureau (WPB), PCD; Jim Castro, WPB, PCD; Jon Dilliard, Chief, Community Services Bureau (CSB), PCD; Rick Thompson, CSB, PCD; Pat Crowley, CSB, PCD; John Arrigo, Administrator, Enforcement Division (ENF); Chris Levine, Resource, Protection, Planning Bureau, Planning, Prevention and Assistance Division; Sandi Olsen, Administrator, Remediation Division (REM); David Bowers, Hazardous Waste Site Cleanup Bureau, REM

Interested Persons Present (*Disclaimer: Names are spelled as best they can be read from the official sign-in sheet.*): J. Chris Pfahl, ASARCO; Beth Ihle, Helena National Forest; Jeff Barber, Montana Environmental Information Center; Doug Dodge, Town Pump; Nick V. Clos, MRWS; Tracy Stone-Manning, Clark Fork Coalition

## **I. ADMINISTRATIVE AGENDA ITEMS**

### **A. APPROVAL OF MINUTES**

1. Review and approve minutes of the June 6, 2003 meeting.

Dr. Smith MOVED for the Board to APPROVE the June 6, 2003 minutes. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE.

2. Review and approve minutes of the June 23, 2003 teleconference meeting.

Dr. Smith MOVED for the Board to APPROVE the June 23, 2003 teleconference minutes. Mr. Hudson SECONDED the motion. The motion CARRIED with a unanimous VOTE.

## **II. ACTION AGENDA ITEMS**

### **A. Initiation of Rulemaking and Appointment of Hearing Officer**

1. In the matter of the solid waste fee rule modifications.

Rick Thompson explained that the Department was requesting Board approval to initiate rulemaking to increase the fees assessed on solid waste management systems. He said the primary purpose of the regulations was to protect the health and welfare of Montana citizens. Mr. Thompson said the Solid Waste Program statutorily collected fees for application review, license transfer, annual renewal of solid waste management system licenses and, on specific classes of landfills, tonnage fees. He also explained the program activities for which the funds were used, including compliance monitoring and conducting inspections.

Mr. Thompson provided background information on the solid waste fees and informed the Board that the fees had not been adjusted since they were established in 1991. He stated that the cost of running the program had exceeded the revenue and that the Solid Waste Advisory Committee was in support of the proposed rules. He provided details on the increases for the specific fees.

Mr. Bowe engaged discussion regarding the difference in fees paid by in-state waste generators and out-of-state waste generators.

Mr. Shanahan MOVED to INITIATE the rulemaking and to appoint Mr. Bowe presiding officer. Dr. Smith SECONDED the motion. The motion CARRIED with a unanimous VOTE.

Chairman Russell opened the floor for public comment, per HB 94. There was no response.

### **B. New Contested Cases**

1. In the matter of the At Home on the Range Pet Cemetery.

Mr. Bowe referred to a legal memorandum he had written that was included in the Board packets. He said he wrote a letter to the appellant explaining that because an affidavit was not included with the request for a hearing, he was going to recommend that the Board not accept the appeal. He said the appellant's response indicated that he was not intending to appeal, but rather to request that the pet cemetery be investigated. Mr. Bowe said that if the Board agreed with his

assessment, a letter was included in the Board packet to be signed by the Chairman. The letter was addressed to the appellant and explained the Board's decision.

Dr. Smith concurred with Mr. Bowe's assessment, though he requested to add some language to thank Mr. Tone for his concern and to indicate that the Department was now aware of the issue.

Dr. Smith MOVED to accept Mr. Bowe's assessment and to order the Chair to sign the letter with the added paragraph. Mr. Shanahan SECONDED the motion. The motion CARRIED with a unanimous VOTE.

2. In the Matter of the request for hearing of Margrit Matter (BER 2003-10 SUB) under Mont. Code Ann. Sec. 76-4-126(1).

Chairman Russell recused himself from this issue and requested that Dr. Smith preside for the discussion of this case.

Mr. Bowe provided background regarding the case. He said he coordinated the schedule with Ms. O'Sullivan's schedule and recommended that she be appointed the hearing examiner for this case.

Mr. Shanahan MOVED to appoint Ms. O'Sullivan. Ms. Brooke SECONDED the motion. The motion CARRIED with a 4-0 VOTE.

3. In the matter of the Notice of Violation and Statement of Proposed Penalty issued to Mission Valley Concrete Industries, Inc. (BER 2003-11 OC).

Dr. Smith MOVED to appoint Mr. Bowe the permanent hearing examiner. Ms. Brooke SECONDED the motion. The motion CARRIED with a unanimous VOTE.

#### C. Other Action Items

1. In the matter of the public hearing for the three-year review of Temporary Water Quality Standards Adopted for the Upper Blackfoot Mining Complex.

Chairman Russell said the hearing was being held for the statutorily required triennial review of the temporary water quality standards that the Board adopted for the Upper Blackfoot Mining Complex in May of 2000.

Mr. Levine explained that ASARCO petitioned the Board for temporary water quality standards in October of 1999 for portions of the Blackfoot River, Mike Horse Creek, and Beartrap Creek. He said the Board adopted temporary standards for aluminum, copper, iron, lead, manganese, zinc and pH in June of 2000. Mr. Levine said the report prepared by ASARCO showed there had been no new reclamation in the three years since the temporary standards were adopted. He described the activities that had taken place related to the implementation plan.

Mr. Levine discussed the Administrative Order on Consent (AOC), milestones in the implementation plan (IP), and other activities that may have direct or indirect effects on the implementation of the temporary standards.

Mr. Castro covered the history and status of the water quality permits at ASARCO sites in the Upper Blackfoot Mining Complex. These included the Old Paymaster Mine and the Mike Horse/Anaconda Mines. The history included violation letters.

Mr. Hudson inquired whether the water quality had improved since the start of the project. Mr. Levine informed him that it had not, but that there had been no real groundwork on the site.

Mr. Bowers provided a brief overview of coordination with the other departments. He discussed DEQ's litigation with ASARCO and ARCO, saying it had been filed but had not yet been served. He said the purpose of the litigation was to conduct a remedial investigation and feasibility study (RI/FS), as well as to recover past costs. He discussed the AOC and the ASARCO trust fund administered by the EPA. Mr. Bowers confirmed that nothing had been done to improve the water quality since the temporary standards were adopted.

Mr. Levine noted that the actual groundwork had been slowed in the process of negotiating the AOC with the Forest Service. He said that since the AOC was now signed, it was time for groundwork to begin, according to the IP.

Mr. Pfahl said ASARCO did not see a need for the RI/FS. He said the private land at the site had been addressed and the remaining work was on public land. He said they hadn't been allowed to do any work because they were at the mercy of the Forest Service. Mr. Pfahl gave a presentation on the history of the site, the work that had been done, and what they saw as going forward. He briefed the Board on the reclamation activities completed prior to the adoption of the temporary standards, the activities during the first three years, and the upcoming site activities and reclamation schedule.

Discussion took place regarding ASARCO's arrears on the fee payment schedule and why the project seems to be moving slower than it could.

Ms. Ihle discussed the Forest Service's involvement with the CERCLA Program and said this site fell under their CERCLA understanding. She said the time-consuming part was the negotiation of the AOC between the attorneys.

Discussion commenced regarding the AOC that would be needed for the groundwork. Funding was also discussed.

Mr. Levine explained that the IP was independent of the Forest Service and the State remedial activities. He said the activities in the IP need to occur in order to continue the temporary standards.

Mr. Levine said three actions were available to the Board: 1) modify the temporary standards; 2) terminate the temporary standards; or 3) extend the temporary standards. He briefed the Board on the pros and cons of each action, in the Department's view. He said the Department was recommending that the Board keep the temporary standards in place, but that the Board receive an update in one year rather than three.

The floor was opened to public comment and Mr. Barber expressed suspicion regarding the fact that it appeared the work had come to a halt when the standards were adopted. He agreed that the Board should receive more frequent updates and said they (MEIC) would oppose any extension of the temporary standards.

The public hearing was concluded.

Discussion commenced regarding updates to the Board. Board members were interested in seeing the work plan before the construction seasons starts. They also wanted to see some implementation or remediation schedule on a yearly basis. Since the annual work plans are due

March 1 of each year, it was decided that the March meeting would be a good time for annual updates. The annual updates are to include budgetary information.

Mr. Hudson suggested the Board visit the site early in the summer of 2004. Board members agreed.

### **III. BRIEFING AGENDA ITEMS**

#### **A. CONTESTED CASE UPDATE**

##### **1. Cases assigned to Hearing Officer Kelly O'Sullivan**

##### **a. In the matter of applicant **Town of Geraldine's Montana Pollutant Discharge Elimination System Permit (MPDES) No. MT-002-0826.****

On behalf of Ms. O'Sullivan, Mr. Bowe said that one of the issues is whether the drainage is truly ephemeral. He said that the EPA's disapproval of the classification that could have applied to this water body has complicated the issue.

##### **2. Cases assigned to Hearing Officer Tom Bowe**

##### **a. In the matter of **M&W Investments, Inc. (EQ #01-1457 and #00-1822).****

Mr. Bowe said the case is set for hearing in December and that the parties were conducting additional water monitoring.

##### **b. **CR Kendall Corporation (BER 2002-09 MM).****

Mr. Bowe informed the Board that the attorneys in this case had agreed to submit the proposed schedule by early September.

##### **c. In the matter of the request of **ExxonMobil Refining & Supply Co. (BER 2003-01 WQ).****

Mr. Bowe reported that the parties were making progress on resolving the issues that were scheduled for hearing in September and that he issued an order staying the proceedings.

##### **d. In the matter of **Sterling Mining Company's MPDES Permit #MT0030287 (BER 2003-06 WQ).****

Mr. Bowe said Sterling Mining Company appealed the fee, then paid the fee, but that he had not received a settlement agreement or stipulation. He said it was possible that the Board would see some sort of closure at the September meeting.

##### **e. In the matter of the Notice of Violation and Statement of Proposed Penalty issued to **Richard Grosswiler (BER 2003-09 OC).****

Mr. Bowe said he had suspended the deadlines in this case because of settlement discussions. He had given the parties a September 10 deadline to file settlement documents in hopes that it could be presented at the September meeting.

##### **f. In the matter of **Spoklie's South Valley Gravel's Mined Land Reclamation Permit #SRL-001 (BER 2003-07 OC).****

Mr. Bowe said he issued an order suspending the deadlines because of settlement negotiations and that he had received a stipulation to settle the case. He informed the Board that

since the paperwork was received too late to include in the supplemental mailing, the item would be on the September agenda for dismissal.

g. In the matter of the request for hearing of **Crystal View Estates, Flathead County, under Mont. Code Ann. §76-4-108 (EQ #01-1095) (BER 2003-05 SUB)**.

Mr. Bowe reminded the Board that Chairman Russell had recused himself in this case. He explained that the briefs were included in the packet because he had thought the issue would be resolved by this Board meeting. He said there were cross motions for summary judgment and that the hearing on the motions was scheduled for August 20. He hoped it would be on the September agenda.

#### B. OTHER BRIEFING ITEMS

1. In the matter of the letter dated June 19, 2003, from the United States EPA, Region 8, concerning its' disapproval of four of the eight new water use classifications adopted by the Board on July 26, 2002, for constructed ditches, seasonal and semi-permanent lakes, and ephemeral streams.

Mr. Livers explained that the EPA had reviewed the standards under the Clean Water Act and concluded that four of the eight classifications did not adequately protect aquatic life. He said that for three of them, EPA determined that the water quality criteria assigned were too limited, primarily due to the lack of an ammonia standard. He said the EPA also concluded that the lack of an aquatic life use for the fourth classification was unacceptable.

Mr. Livers informed the Board that under the Clean Water Act if acceptable changes are not made within 90 days of the notification, EPA is required to promulgate acceptable standards. He said that the DEQ had been working with Region 8 to formulate a solution and that the EPA was using its flexibility to allow the DEQ to pursue it.

Mr. Livers said the proposed changes would be more protective of aquatic life and that DEQ feels the changes would not reduce the usefulness of the new classifications. He said it was possible that the rulemaking would be ready for the Board's review and initiation at the September meeting, though it was more likely to be December.

Mr. Livers explained that although the EPA had been notified of the original rulemaking, the notification had not reached one key person in the regional office. He said that had been corrected and the key person is now on the mailing list.

Mr. Livers suggested taking public comment since this was a briefing item. Chairman Russell offered the floor to any member of the public that wished to speak to the matter.

Mr. Bowe reminded the Board that he had been the presiding officer for the rulemaking, that the public hearing was held in May of last year, and that there had been a lot of public interest. He recalled from the hearing very little concern about the impact to aquatic life since they were expected to be ephemeral and would dry up occasionally. He said the Town of Geraldine was not the only community left in limbo.

Discussion took place regarding the notification to EPA that was not received by the necessary person. It was suggested that DEQ should get something more formal from EPA

regarding their flexibility with this and that they did not intend to act if a solution was not implemented in the 90-day timeframe.

Chairman Russell offered the floor to the public. No one responded.

#### IV. GENERAL PUBLIC COMMENT

Chairman Russell asked if any member of the public wished to comment on any public matter within the jurisdiction of the Board.

Ms. Stone-Manning expressed desire to speak to the issue of the Mike Horse hearing, since she had not made it in time to speak at the hearing. She said the Upper Blackfoot had been polluted by heavy metals since 1975 and that it still doesn't come close to meeting state water quality standards. She said three years ago the Clark Fork Coalition had urged the Board to not grant the temporary water quality standards. She said the Board granted an eight-year standard and that ASARCO was to adhere to an aggressive cleanup plan.

Ms. Stone-Manning provided background information about ASARCO and about the site. She also showed pictures of the site. She said the Clark Fork Coalition was asking the Board not to grant any further exceptions or relaxations of the standard.

Chairman Russell requested a briefing on what would happen if the Board rescinded the water quality standards. Dr. Smith requested that the Forest Service and ASARCO be notified of the agenda item.

#### V. ADJOURNMENT

Dr. Smith MOVED to ADJOURN. Mr. Shanahan SECONDED the motion. The meeting adjourned at 10:42 a.m. by unanimous VOTE.

Board of Environmental Review August 1, 2003 Minutes Approved:

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JOSEPH W. RUSSELL, M.P.H.  
CHAIRMAN  
BOARD OF ENVIRONMENTAL REVIEW

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DATE